FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT,
COMMISSIONER OF THE DEPARTMENT OF HUMAN
SERVICES, STATE OF MAINE,
Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT,
AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

BRIEF OF AMICI CURIAE VOLUNTEER LAWYERS PROJECT OF THE BOSTON BAR ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION.

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TABLE OF CONTENTS

Interest of the amici curiae 1

Description of the amici 3

The Volunteer Lawyers Project 3

The Lawyers' Committee for Civil Rights Under Law 5

Argument 6

I. In the 1976 amendment to Section 1988, Congress intended to permit attorneys' fee awards in actions to vindicate statutory rights under Section 1983 6

II. Restricting Section 1983 actions to constitutional and equal rights violations would seriously impair Congress's objectives in amending Section 1988 10

A. The involvement of private lawyers is essential in litigation to enforce federal statutory rights 11

B. Interpreting Section 1983 to require litigants to state a claim under the Constitution or equal rights laws will add to the cost and complexity of section 1983 litigation and will reduce the availability of lawyers for the poor 14

1. Maine's position will cause the unnecessary assertion and defense of constitutional claims, thereby wasting the limited resources of the private bar and increasing the cost of Section 1983 litigation 14

2. Maine's position would unnecessarily increase the length of time needed to determine a case on the merits 18

3. Maine's position would discourage consent decrees 19

III. Maine would reintroduce the inconsistency in the availability of attorneys' fees that the amendment to Section 1988 was enacted to eliminate 19

Conclusion 21

TABLE OF AUTHORITIES CITED

Cases

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 12, 13, 20

Blue v. Craig, 505 F.2d 830 (4th Cir. 1974) 7n, 15, 16

Bond v. Stanton, 528 F.2d 688 (7th Cir.), vacated and remanded, 429 U.S. 973 (1976), opinion on remand, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978) 8

Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) 19

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 14

Edelman v. Jordan, 415 U.S. 651 (1974) 15

Gagne v. Maher, 594 F.2d 336 (2d Cir.), cert. granted, 48 U.S.L.W. 3189 (1979) 15, 19

Hagans v. Lavine, 415 U.S. 528 (1974) 14, 15

Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 567 F.2d 1381 (8th Cir. 1977) 19

Kruse v. Campbell, 431 F.Supp. 180 (E.D. Va. 1977), vacated and remanded, 434 U.S. 808 (1977) 15

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 19

New York City Transit Authority v. Beazer, ____ U.S. ____, 59 L.Ed.2d 587 (1979) 16

Oliver v. Kalamazoo Board of Education, 576 F.2d 714 (6th Cir. 978) 17

Palmigiano v. Garrahy, No. 79-1185 (1st Cir. March 3, 1980) 17

Randall v. Goldmark, 495 F.2d 356 (1st Cir. 1974) 16

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 16

Seals v. Quarterly County Court, 562 F.2d 1390 (6th Cir. 1977) 16

Specter Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944) 16

Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), affirmed, 550 F.2d 464 (9th Cir. 1977), reversed, 436 U.S. 547 (1978) 17

Statutes

20 U.S.C.

§§ 1411 et seq. 11

§ 1415 11

28 U.S.C. § 1343(3) 15

42 U.S.C.

§ 1382(a)(8) 15

§ 1983 2, 6, 7n, 8, 9, 10, 14 et seq.

§ 1988 2, 4, 6, 8, 9, 10, 11 et seq.

Agricultural Unfair Trade Practices Act, 7 U.S.C. §§ 2305(a), (c) 20n

Bankruptcy Act, 11 U.S.C. §§ 303(i)(11)(B), 503(b)(4) 20n
Communications Act of 1934, 47 U.S.C. § 206 20n
Interstate Commerce Act, 49 U.S.C. §§ 11705 (d)(3), 11708(c), 11710(b) 20n
Jewelers Hall-Mark Act, 15 U.S.C. §§ 298(b), (c), (d) 20n
Packers and Stockyards Act, 7 U.S.C. § 210(f) 20n
Plant Variety Act, 7 U.S.C. § 2565 21n
Rehabilitation Act of 1973, 29 U.S.C. § 794 15
Securities Act of 1933, 15 U.S.C. § 78i(e) 21n
Securities Exchange Act of 1934, 15 U.S.C. § 78r(a) 21n
Social Security Act, 42 U.S.C. 18
§ 625 15
§§ 1396a et seq. 7n
Trust Indenture Act, 15 U.S.C. § 77www(a) 21n
Pub. L. No. 94-559 6
R.S. 1979 2, 8

LEGISLATIVE MATERIALS

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on Judiciary, 94th Cong., 1st Sess. (1975) 7, 8, 9
121 Congressional Record 26806 (1975) 8, 20
122 Congressional Record (1976)
31471 10
31472 10
33314 8, 10
33315 8

35122 7, 8
35128 7, 10
H.R. 9552 6, 7
H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 11, 12, 13
S. 2278 7, 8
S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) 8, 10, 19, 20

MISCELLANEOUS

J. Abramson, Special Education and Due Process: A Study of In-School Maintenance Cases Brought to Administrative Appeal Under Chapter 766 (Massachusetts) (unpublished thesis, Boston University, School of Education) (1979) 11, 12
Action Plan for Legal Services: Report on the Legal Problems of the Poor in Boston — Part 1: Civil Legal Needs (Boston Bar Association 1977) 3, 11
Administrative Office of the U.S. Courts, 1976 Annual Report of the Director 9n
American Bar Association Code of Professional Responsibility Ethical Consideration 2-25 12
American Bar Association Resolution PI-8-75-S26 (approved by ABA, August 1975) 9, 12
Balancing the Scales of Justice: Financing Public Interest Law in America, A Report by the Council for Public Interest Law (1978) 13
Federal Rules of Civil Procedure, Rule 12(b)(6) 15
"Implementing the Lawyers' Public Interest Practice Obligation," American Bar Assn. Monograph, 1977 9

Janofsky, A.B.A. Attacks Delay and the High Cost of Litigation, 65 A.B.A.J. 1323 (1979) 18

Report of September 1979 Monitoring Visit by the Legal Services Corporation 5

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INTEREST OF THE AMICI CURIAE.

The Volunteer Lawyers Project of the Boston Bar Association ("Project") and the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Com-

mittee") submit this amicus brief in support of the Respondents, Joline and Lionel Thiboutot and all others similarly situated.

In this case, the State of Maine ("Maine") asserts that R.S. 1979, codified as 42 U.S.C. § 1983 ("Section 1983"), does not provide a cause of action for violation of rights, privileges or immunities protected by federal law. Maine further asserts that attorneys' fee awards for plaintiffs' counsel are not available in actions brought under Section 1983 to vindicate federal statutory rights, despite the language of 42 U.S.C. § 1988 ("Section 1988").

The amici believe that the adoption of Maine's position would have a profound and damaging impact on the provision of legal services to the poor by private law firms and by projects relying on the resources of the private bar, such as amici. Maine's position would seriously impair the amici's ability to meet the legal needs of Boston's poor residents, would interfere with the efforts of amici and similar projects to fund a portion of their programs through Section 1988 fee awards, and would place a severe strain upon the resources of the private bar. In addition, adoption of Maine's interpretation would increase the cost of litigation to enforce federal statutory rights, by dramatically increasing the time such litigation would take and the scope the litigation would have to assume. This result is contrary to the interest of poor litigants, such as the Thiboutots; of pro bono publico projects, such as amici, and the private bar; of the state and federal courts; and of Maine and other states.

For the reasons set out below and in the Thiboutots' brief, the Project and the Lawyers' Committee urge this Court to affirm the decision of the Maine Supreme Judicial Court.

Description of the Amici.

The Boston Bar Association has one of the nation's most innovative and active programs for private bar involvement in pro bono publico work. The Lawyers' Committee, founded in 1968, was the first local affiliate of the National Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee has been sponsored by the Boston Bar Association since 1973.

The Boston Bar Association has developed two other distinctive projects through which private lawyers and paralegals can perform a variety of pro bono publico services. These programs were developed to implement the Association's 1977 Action Plan for Legal Services: Report on the Legal Problems of the Poor in Boston — Part 1: Civil Legal Needs ("Action Plan"), a two-year study documenting the legal needs of the poor in Boston's communities. As the Action Plan demonstrated, Boston's publicly-funded legal services offices were able to meet less than one-third of the recognized legal needs of Boston's poor. *Id.* at 6. Such legal services offices, primarily because of severe underfunding, could not provide the necessary increased level of services, and the private bar in Boston represented a substantial untapped resource for legal representation of the poor. *Id.* at 6-8.

The Volunteer Lawyers Project.

The Project was the first of the Association's programs to be implemented under the Action Plan. It was organized in January 1977. The Project operates with a volunteer attorney panel of more than 650 private attorneys. Its membership includes both recent admittees and experienced lawyers, sole practitioners, lawyers in small offices, lawyers in Boston's

largest law firms, corporate counsel — indeed, partners and associates in law offices of all sizes and kinds. Many of the Project's volunteer lawyers have actively participated in the program since its inception, and the rate of retention is exceptionally high.

The Project is funded by the federal Legal Services Corporation. Fee applications made by Project volunteer attorneys on behalf of the Project under state and federal statutes providing for fee awards, including Section 1988, will provide an increasingly significant part of the Project's funding.

Each year, the Project receives more than 5,000 requests for assistance. In 1979, approximately 2,000 clients received help with their legal problems from the Project's volunteer attorneys and staff. Each of these cases requires on the average twenty hours of lawyer time. (This average includes matters having two to three hour time commitments, such as uncontested divorces, advice-only cases and cases that are settled promptly.) In 1979, the Project thus provided over 40,000 hours of high quality, free legal services to poor people in Boston, of a total value exceeding $3 million.

The Project's caseload consists of "service" rather than law reform cases. Its panel attorneys are principally committed to representing individual clients having a variety of personal legal problems, such as housing evictions, divorces, Social Security and welfare appeals, education appeals, consumer problems — the whole panoply of legal problems afflicting poor people in Boston. Panel attorneys occasionally bring class action or law reform cases, but only where, in the judgment of the panel attorney, such litigation is necessary to secure the individual client's rights.

The Project is one of eight experimental programs in the country to receive continued funding in 1980 from the federal Legal Services Corporation. In deciding to continue financial

support of the Project, the Legal Services Corporation relied on a recent independent evaluation of the Project, which cited the Project's overwhelming success in establishing an effective delivery mechanism to complement the services provided by Boston's hard-pressed neighborhood legal services offices. Report of September 1979 Monitoring Visit by the Legal Services Corporation. The evaluation report took particular note of the Project's innovative intake and referral system and the high calibre of services provided to clients. *Id.**

The Lawyers' Committee for Civil Rights Under Law.

The Lawyers' Committee provides representation in class action and law reform cases on behalf of minorities and poor people in Boston. It is the law reform program of the Boston Bar Association and marshals the resources of over twenty Boston law firms that handle cases as law firms. Its caseload consists of complex litigation, both statutory and constitutional. The cases the Lawyers' Committee handles frequently require hundreds of hours of lawyer time.

Matters currently handled by the Lawyers' Committee include cases in the areas of housing and urban development, education, racial violence, equal employment opportunity,

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* The Association's third and newest pro bono effort is the Law Firm Resources Project, which began operation in January 1979. In this project, a number of large Boston law firms are "matched" with neighborhood law offices of Greater Boston Legal Services and provide consultation on specialized areas of law and on litigation strategy, access to forms and pleading files, advice on office and library management, use of Lexis, and lawyer, paralegal and secretarial personnel. The project enables these hard-pressed legal services offices to expand their services by using the expertise and resources of Boston's large corporate law firms. This project provides no direct client services and hence is not an amicus here.

police misconduct, and the rights of children, prisoners and the developmentally disabled.

The Lawyers' Committee receives no public funding. Its income is derived from participating law firms, the Boston Bar Association and private donations. Fee awards from successful litigation, including awards under Section 1988, are becoming a significant income source for the Lawyers' Committee.

ARGUMENT.

I. In the 1976 Amendment to Section 1988, Congress Intended to Permit Attorneys' Fee Awards in Actions to Vindicate Statutory Rights Under Section 1983.

The drafters of the 1976 amendment to Section 1988, Pub. L. No. 94-559, intended that attorneys' fee awards would be available in cases brought under Section 1983 to enforce federal statutory rights, including welfare claims, as well as racial discrimination (equal rights) and other constitutional claims.*

Thus, Representative Drinan, the sponsor of H.R. 9552, stated in the House debates that the bill would authorize the payment of counsel fees in cases to enforce federal rights "in a variety of areas, including contractual relationships, property transactions, and federally assisted programs and activities." Representative Drinan continued:

* The amici join the arguments set out in the Thiboutots' brief, which, the amici believe, establish that Section 1983 provides, as it explicitly states, a cause of action for violation under color of state law of any federal statutory right. The amici's area of concern in this brief is limited to the availability of attorneys' fees under Section 1988 and the effective use of the resources of the private bar.

> "Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials *based upon federal statutory as well as constitutional rights*. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)." 122 Cong. Rec. 35122 (1976). (Emphasis added.) *

Subsequently, Representative Seiberling restated this proposition, quoting from the testimony of Armand Derfner of the National Lawyers' Committee, a witness at the hearings on the bill:

> "'The *Alyeska* [*Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)] decision created an unexpected and anomalous gap in laws. . . . Fees are allowed in a suit under Title II of the 1964 Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution *or laws* by officials who are sworn to uphold the laws.'" *Id.* at 35128, *quoting from* Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on Judiciary, 94th Cong., 1st Sess. 85 (1975) ("House Hearings"). (Emphasis added.)

Similarly, the Senate Report on S. 2278, the Senate version of H.R. 9552, reveals that the Senate Judiciary Committee sup-

* In *Blue* v. *Craig* — a case, like *Thiboutot*, based entirely on federal rights secured by the Social Security Act, 42 U.S.C. §§ 1396a *et seq.*, and regulations promulgated thereunder — the District Court sua sponte dismissed the complaint for failure to state a claim under Section 1983. The Fourth Circuit, declining to read the phrase "and laws" out of Section 1983, had "no difficulty in resolving that this action, which seeks to invalidate a state-wide regulation alleged to deprive the plaintiffs of civil rights given them by the Social Security Act, even if regarded as being wholly statutorily-based, qualifies under § 1983." *Id.* at 836. (Footnote omitted.)

ported the enactment of Section 1988 in order to provide attorneys' fees "in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) ("Senate Report"). See 121 Cong. Rec. 26806 (1975) (remarks of Senator Tunney introducing S. 2278).

Echoing Representative Drinan's remarks (p. 7 *supra*), Senator Kennedy, a sponsor of S. 2278, in the Senate floor debate, cited as an example of the need for the attorneys' fees bill the situation that had arisen in *Bond* v. *Stanton*, 528 F.2d 688 (7th Cir. 1976).* 122 Cong. Rec. 33314 (1976). *Bond* v. *Stanton* was a Section 1983 action based solely on state officials' violation of federal statutory law — the Medicaid provisions of the Social Security Act. Shortly thereafter, Senator Abourezk, the floor manager of the bill, advised the Senate, "This legislation is intended to cover cases based on both constitutional and statutory rights, including supremacy clause cases. See 42 U.S.C. § 1983." 122 Cong. Rec. at 33315.

Representative Drinan and the Senate Committee described Section 1983 as a "civil rights law." This nomenclature derived in part from the popular name, the "Reconstruction Civil Rights Acts," which included R.S. 1979. See Senate Report at 4; House Hearings at 84-85; cf. 122 Cong. Rec. 35122 (1976) (remarks of Representative Drinan). Mr. Derfner described "civil rights cases," in this context, as those "enforcing the rights of minority groups and poor people," including cases "in which a statute is not being enforced" by the government.

* *Vacated and remanded*, 429 U.S. 973 (1976), *opinion on remand*, 555 F.2d 172 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). The court on remand referred to Senator Kennedy's comments in holding that attorneys' fees were available in a statutory Section 1983 action. 555 F.2d at 174. Maine, in its list of Senator Kennedy's examples of the cases to which the amendment was intended to apply, omits Senator Kennedy's reference to *Bond* v. *Stanton* (Maine Brief at 21-22 & n.29).

House Hearings at 81, 100. Congress's nomenclature is echoed by the American Bar Association's broad definition of the phrase "civil rights law" in its widely publicized 1975 resolution on lawyers' pro bono publico obligations, as "[l]egal representation involving a right of an individual which society has a special interest in protecting" — an expansive concept that includes many federal statutory entitlements within its scope. See PI-8-75-S26 (approved by ABA, August 1975), quoted in "Implementing the Lawyers' Public Interest Practice Obligation," American Bar Assn. Monograph, 1977.*

Maine argues that Section 1983 creates a cause of action against state officials or other persons acting under color of state law only if they deprive a person of rights, privileges or immunities "arising under the Constitution or [equal rights] laws." The addition of the language Maine wishes to see in the statute — a feat not normally accomplished by the federal courts and an unauthorized amendment of Section 1983 — would deny the benefits of Section 1988 fee awards to a class of cases that Congress explicitly intended to include.

* The greater number of references in the legislative history to "discrimination" cases does not point to a different definition of "civil rights." Not surprisingly, Congress was more concerned with the more significant body of discrimination law — in the year ended June 30, 1976, 11,885 discrimination cases were filed in federal district courts, 9.3% of the total 130,597 civil filings, while only 222 welfare cases were filed, a mere 0.17% of the total civil filings. Administrative Office of the U.S. Courts, 1976 Annual Report of the Director. It is patent that Congress did not amend Section 1988 to provide attorneys' fee awards solely in discrimination cases — indeed, as Congress itself noted, fees in most discrimination cases were already available under preexisting law.

II. Restricting Section 1983 Actions to Constitutional and Equal Rights Violations Would Seriously Impair Congress's Objectives in Amending Section 1988.

In amending Section 1988, Congress's primary purpose was to ensure that important federally-created rights could be enforced by those who could not afford to hire a lawyer. See Senate Report at 2, 6 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"; "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases"); 122 Cong. Rec. 31471 (1976) (remarks of Senator Scott); *id.* at 31472 (remarks of Senator Kennedy); *id.* at 33314 (remarks of Senator Tunney); *id.* at 35128 (remarks of Representative Seiberling).

The ruling that Maine seeks from this Court — that Section 1983 actions can be brought, and attorneys' fees awarded, only to enforce federal constitutional or equal rights — would seriously undermine Congress's objectives in amending Section 1988. Such a ruling not only would limit the enforceability of statutory rights but also would increase substantially the cost and complexity of litigation and reduce the availability of lawyers to the very class of persons Congress intended to protect. These increases in cost would be both tangible and intangible. Maine's interpretation would stimulate unnecessary constitutional adjudication, thereby increasing the expenditure of judicial time. It would increase lawyer time for each case and thereby reduce the number of people whom pro bono publico projects such as amici could serve. It would increase awarded attorney's fees, thereby costing the states more. And it would limit the ability to vindicate federal statutory rights to the very poor or the very wealthy.

A. The Involvement of Private Lawyers is Essential in Litigation to Enforce Federal Statutory Rights.

In amending Section 1988, Congress recognized that the private bar plays a critically important role in the vindication of federal statutory rights. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976) ("House Report"). This recognition is borne out by the Action Plan, in which the Boston Bar Association found that a poor litigant represented by a legal services lawyer had a probability of a favorable outcome (including settlement) of 73%; if represented by a private lawyer, this probability rose slightly to 79%; but with no lawyer, a poor litigant's chance of success dropped to 49%. Thus, in the variety of legal situations studied, the presence of a lawyer substantially increased a poor person's chances of obtaining a favorable outcome. Action Plan, Table 18, p. 47. The Action Plan also found that legal services offices in Boston were able to meet less than one-third of the recognized legal needs of Boston's poor inhabitants and that the involvement of the private bar in Boston to provide legal services to the poor was essential. *Id.* at 6-8, 105-122.

A more recent Boston study, directly examining the impact of legal representation on obtaining a federal statutory entitlement — the right of a child with special education needs to receive an adequate and appropriate education (see 20 U.S.C. §§ 1411 *et seq.*) — is even more emphatic. Lower-income parents and children, the study found, are virtually incapable of obtaining a favorable outcome in the federally-mandated hearing process (see 20 U.S.C. § 1415) without a lawyer or legal representative. J. Abramson, Special Education and Due Process: A Study of In-School Maintenance Cases Brought to Administrative Appeal Under Chapter 766 (Massachusetts) (unpublished thesis, Boston University, School of Education) (1979), at 81-82. Thus, in the twenty-seven cases studied

where the parent was represented, the parent won (including obtaining an "acceptable" settlement) twenty cases and lost seven. In the twenty cases where the parent was not represented, the parent won six cases and lost fourteen. *Id.* at 82. This study illustrates again the vital importance of legal assistance to the vindication of federally guaranteed rights.

The importance of the private bar in meeting the legal needs of the poor is further evidenced by the American Bar Association's resolution in August 1975, confirming that "it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services." PI-8-75-S26 (approved by ABA, August 1975). The American Bar Association affirmed that lawyers have an ethical obligation to provide pro bono publico services in five areas, defined as poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice. *Id.* See also ABA Code of Professional Responsibility Ethical Consideration 2-25.

In amending Section 1988, Congress recognized the serious negative impact of *Alyeska* on the availability of private legal resources for the poor. Indeed, the House Report cited the testimony of witnesses from the National Lawyers' Committee, the Council for Public Interest Law and other pro bono publico projects that *Alyeska* would have a "devastating impact" on their programs. Congress also considered evidence, equally applicable here, that elimination of fee awards from "civil rights" — including federal statutory — cases will have an equally debilitating effect on the willingness of lawyers in public interest law firms or other small firms to handle such litigation, since these lawyers must, as a matter of economics, obtain at least some fees from this work.

Thus, in a report cited by Congress, House Report at 3, n.3, the Council of Public Interest Law, quoting an attorney with the NAACP Legal Defense and Education Fund, Inc., explained the impact of *Alyeska* on an attorney in private practice with a small firm who had wanted to devote a substantial portion of his time to enforce public policy:

> "The real impact of the ruling will be in terms of our work with private attorneys in the South. Awarded fees have never been a significant part of our budget. . . . In most cases we work with private lawyers, and it matters to them in terms of the amount of civil rights work they are willing to take on.
>
> "When we go to a guy now in the South, and ask him to take on a prison case, most of which are brought under these older laws [including R.S. 1979], he'll say he can't do it. He'll have to put thousands of hours into it without any hope of getting paid. It will be different if we ask him to take an employment case under the 1964 Civil Rights Act because he can anticipate some fee award if he wins it." Balancing the Scales of Justice: Financing Public Interest Law in America, A Report by the Council for Public Interest Law 316 (1978).

Thirty-four of the forty-four private public interest law firms surveyed by the Council reported that they had claims adversely affected by *Alyeska*. *Id.* at 318. "Even worse," the Council continued, "those 34 reported that they will be unable to do as much public interest work as a result of the Supreme Court's decision." *Id.*

Congress amended Section 1988 in large measure to eliminate such an impact and to reduce the strain on the resources of the private bar. House Report at 3. This Court should not excise this congressional policy from the statute.

B. Interpreting Section 1983 to Require Litigants to State a Claim Under the Constitution or Equal Rights Laws Will Add to the Cost and Complexity of Section 1983 Litigation and Will Reduce the Availability of Lawyers for the Poor.

1. *Maine's Position Will Cause the Unnecessary Assertion and Defense of Constitutional Claims, Thereby Wasting the Limited Resources of the Private Bar and Increasing the Cost of Section 1983 Litigation.*

Maine's proposed revision of the unambiguous language of Section 1983, that a cause of action under that statute must assert rights secured under the Constitution or under equal rights laws, will save Maine $5,622.06 in attorneys' fees and expenses in this case (A. 37-38), because the Thiboutots' lawyer, having stated a violation of the Thiboutots' state and federal statutory rights so plainly that Maine did not even appeal from the grant of summary judgment against it below (A. 31-32, 43-44, 50), did not feel compelled to add to the complaint a colorable constitutional claim.

Maine's effort to save $5,622.06, if adopted, will substantially increase the burden on the federal courts and the costs of Section 1983 litigation to the states and to poor people seeking to use the courts to vindicate federally guaranteed statutory rights.

To state a cause of action under the Constitution sufficient to bring a claim in federal court, *see Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979), a litigant must meet the test of substantiality set out in *Hagans* v. *Lavine*, 415 U.S. 528 (1974) — he must state a claim that is not "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous" or "no longer open to discussion." *Id.* at 536, 537. (Citations omitted.)

Hagans requires a federal district court first to determine whether the constitutional claim appears to be nonfrivolous on its face. If so, the court has jurisdiction and then must decide any pendent state or federal statutory claims, if possible, to avoid unnecessary constitutional adjudication.

Maine's reading of Section 1983, if accepted, would force plaintiffs' counsel to state barely colorable constitutional claims, sufficient under *Hagans*, in order to bring Section 1983 actions. Of course, all such cases could then be brought in federal court, under 28 U.S.C. § 1343(3). And the majority of statutory Section 1983 cases would continue to be brought. Many, if not most, cases brought to enforce a federal statutory right contain within them the seed of a federal constitutional claim. See, e.g., *Edelman* v. *Jordan*, 415 U.S. 651, 653 n.1, 655-56 (1974) (42 U.S.C. § 1382(a)(8) and the equal protection clause); *Gagne* v. *Maher*, 594 F.2d 336, 341 (2d Cir.), *cert. granted*, 48 U.S.L.W. 3189 (1979); *Blue* v. *Craig*, *supra*, 505 F.2d at 844; *Kruse* v. *Campbell*, 431 F. Supp. 180, 185-86 (E.D. Va. 1977) (right of handicapped child to education; case arising under Rehabilitation Act of 1973, 29 U.S.C. § 794, and Social Security Act, 42 U.S.C. § 625, as well as under equal protection and due process clauses), *vacated and remanded* for determination on statutory grounds, 434 U.S. 808 (1977).

Maine's reading of Section 1983 would dramatically increase the cost, duration and complexity of Section 1983 actions. Thus, in the experience of amici, the statement of a colorable constitutional claim invites a state defendant's immediate assertion of a motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint for failure to state a claim. The probability of the assertion of a Rule 12(b)(6) motion would increase if its determination would end the entire litigation, as would be the case if the phrase "and laws" were read out of Section 1983. And where the recovery of attorneys' fees also depends on the determination of a constitutional claim, it

is certain that a state would make that preliminary challenge. Further, as a practical matter, many federal courts would increase the threshold showing of substantiality, thereby further increasing the complexity of the litigation. Compare, e.g., *Randall* v. *Goldmark*, 495 F.2d 356 (1st Cir. 1974), with *Blue* v. *Craig*, *supra*.

At present, many private attorneys who are not involved with law reform but who, like the panel attorneys in the Project, are concerned solely with representation of an individual client to achieve a desired result, will abstain from raising constitutional claims where there is a plain statutory right. This spareness of pleading has a single justification: to reduce the time, cost and complexity of litigation, so as to achieve the desired result as quickly as possible. Moreover, constitutional law is complex and rapidly-changing, and to the corporate and commercial attorneys who form the nucleus of the Project's volunteer lawyers panel, it is an unfamiliar area.

The increase in constitutional adjudication that will result from Maine's proposed revision of Section 1983 is a costly and wasteful use of the time and resources of every participant in the litigation process. Such unnecessary constitutional litigation is uneconomical from the perspective of the states, which may eventually have to pay increased fees under Section 1988. It would unnecessarily burden the courts with an increased amount of complex constitutional litigation and would provoke substantial unnecessary constitutional adjudication, in violation of the well-established principle that courts should avoid deciding constitutional issues unless it is absolutely necessary. *New York City Transit Authority* v. *Beazer*, ____ U.S. ____, 59 L.Ed.2d 587, 600 (1979); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568-74 (1947); *Specter Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101 (1944); *Seals* v. *Quarterly County Court*, 562 F.2d 390, 392 (6th Cir. 1977).

Most unfortunately, however, the unnecessary complexity of such litigation would waste the amici's most valuable resource — the time of the individual lawyer — and would reduce the availability of legal representation to the poor, contrary to Congress's intent in enacting the 1976 amendment to Section 1988. As noted above, Project panel lawyers spent an average of twenty hours per case on the 2,000 cases the Project handled last year. Panel lawyers raising a federal statutory claim, unencumbered with constitutional claims or class action allegations, will spend an average of approximately 40-60 hours per case, for an average cost, if fees were awarded, of $3,000-$4,500. Constitutional litigation, on the other hand, is complex litigation, requiring in the Lawyers' Committee's experience an average of hundreds of hours per case, and the cost of such litigation can easily exceed $100,000. Compare, e.g., the fee award of less than $6,000 sought here with the $115,483.75 fees award in two prison reform cases upheld in *Palmigiano* v. *Garrahy*, No. 79-1185 (1st Cir. March 3, 1980). See also *Oliver* v. *Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978) (school desegregation case, awarding $283,925 based on straight time, without multiplier); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 686-88 (N.D. Cal. 1974), *affirmed*, 550 F.2d 464 (9th Cir. 1977), *reversed on other grounds*, 436 U.S. 547 (1978) (search and seizure case, determined on summary judgment motion, awarding $47,500 in fees for 750 hours).

Each of the Project's 650 volunteer lawyers will give the Project a total time commitment of approximately 60 hours per year. A substantial increase in the amount of time any class of cases will take will reduce the total number of cases the Project can handle. A Project lawyer, in short, can take one constitutional case or three statutory cases every two years. Maine's proposed increase in constitutional litigation would thus reduce by as much as two-thirds the number of people the

Project can serve, from the 2,000 it presently serves, to 700 or fewer. This would seriously impair the Project's effort to make legal services broadly available to the poor in Boston.

2. *Maine's Position Would Unnecessarily Increase the Length of Time Needed to Determine a Case on the Merits.*

The unnecessary constitutional adjudication which Maine's statutory revision would require would also unnecessarily increase the length of time between the filing of a complaint and the determination by the court on the merits of the statutory claim. Cases to enforce federal statutory rights involve, as Congress recognized in amending Section 1988, issues which are significant to the litigants and to the public. The interpretation of the Social Security Act at issue in this case, for example, was extremely important to the Thiboutots' ability to support their family and to clothe, house and feed their children adequately. It was also important to Maine to receive a prompt adjudication of the lawfulness of its interpretation of the Social Security Act. And it is important to the judicial system that the public perceive courts as a place where problems are solved and cases determined expeditiously, thus ameliorating the "climate of public cynicism and mistrust of the legal profession, the judiciary, and the legal system." Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A.J. 1323 (1979).

If Section 1983 were now construed as requiring the assertion of a merely colorable constitutional claim in order to vindicate a federal statutory right, the federal courts will be deluged with difficult and time-consuming constitutional claims, which they will often have to adjudicate in order to determine questions of jurisdiction and the availability of attorneys' fees.

Such a ruling would truly open the floodgates to the federal courts.

3. *Maine's Position Would Discourage Consent Decrees.*

Maine's position, finally, would discourage parties from settling Section 1983 actions by entering into consent decrees which explicitly deny liability or the validity of a federal constitutional claim. The legislative history of Section 1988 and its subsequent judicial interpretations clearly reveal that a plaintiff who enters into such a consent decree may be considered a "prevailing party" entitled to attorneys' fees. Thus, the Senate Report explicitly states that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Senate Report at 5. See *Gagne* v. *Maher*, *supra*; *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978); *Brown* v. *Culpepper*, 559 F.2d 274, 277 (5th Cir. 1977). See also, *Inmates of Nebraska Penal and Correctional Complex* v. *Greenholtz*, 567 F.2d 1381 (8th Cir. 1977) (plaintiffs were entitled to legal expenses, even though they were denied injunctive relief because defendants had discontinued the activities complained of before adjudication). If Maine's reading of Section 1983 were adopted, plaintiffs' lawyers would be unable to enter into a consent decree denying the existence of a constitutional claim, because of the unavailability of fees.

III. Maine Would Reintroduce the Inconsistency in the Availability of Attorneys' Fees that the Amendment to Section 1988 was Enacted to Eliminate.

In amending Section 1988, Congress had as an important additional objective the elimination of the inconsistent availa-

bility of attorneys' fees: although fees were explicitly available under some federal statutes protecting the rights, privileges and immunities of citizens, such fees were not, because of this Court's decision in *Alyeska*, available to vindicate rights under other equally important statutes. See Senate Report at 4; 121 Cong. Rec. 26806 (remarks of Senator Tunney).

Thus, Section 1983 litigation against state officials or persons acting under color of state law for violations of federal statutes pertaining to mental health, welfare, education of the handicapped, health, and housing are often brought by amici, but in many of these areas, no congressional authorization of fees exists other than Section 1988. These rights are of vital importance to the indigent and simply cannot be aggressively protected by counsel if attorneys' fees are unavailable.

When Congress enacted Section 1988, it sought to remedy the inconsistency whereby fees were available only for violation of some civil rights acts. Consistent with that purpose, this Court should interpret Section 1983 as including all civil deprivations by state officials of federal statutory rights. Any other interpretation would ignore the clear congressional concern to preserve incentives to challenge state deprivations of federal rights and would frustrate Congress's effort to provide the same pragmatic support to such challenges as it has provided in more recent civil rights statutes — and, one might add, in much commercial legislation.*

* A large number of commercial statutes provide for recovery of attorneys' fees as a practical way for private litigants to vindicate their federal statutory commercial rights. *See, e.g.*, Agricultural Unfair Trade Practices Act, 7 U.S.C. §§ 2305(a), (c) (suits against agricultural products handler for violations of the Act); Bankruptcy Act, 11 U.S.C. §§ 303(i) (11)(B), 503(b)(4); Communications Act of 1934, 47 U.S.C. § 206 (suits arising from violations of Act by common carriers); Interstate Commerce Act, 49 U.S.C. §§ 11705 (d)(3), 11708(c), 11710(b); Jewelers Hall-Mark Act, 15 U.S.C. §§ 298(b), (c), (d) (suits for violations of Act by falsely stamping gold or silver); Packers and Stockyards Act, 7 U.S.C. § 210(f) (suits for violations of Act by stockyard owner, market agency, or dealer); Plant Variety Act, 7 U.S.C. § 2565 (suits against infringers of "plant patents"); Securities Act of 1933, 15 U.S.C. § 78i(e) (suits for manipulation of security prices); Securities Exchange Act of 1934, § 78r(a) (suits for misleading statements); Trust Indenture Act, 15 U.S.C. § 77www(a) (suits for misleading statements).

Conclusion.

For the foregoing reasons, the amici curiae Volunteer Lawyers Project and Lawyers' Committee respectfully urge the Court to affirm the judgment of the Maine Supreme Judicial Court.

Respectfully submitted,

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